LEONG AH KEW & ORS v. PRISMA SURIA SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[CIVIL SUIT NO: 22NCVC-159-10-2014]
27 JULY 2015

CONTRACT: *Breach – Agreement – Joint venture agreement (JVA) – Failure by defendants to develop land within stipulated time – Construction of clauses in JVA – Whether defendant's failure to develop land was due to plaintiffs' failure to evict squatters and demolish buildings on land (evict and demolish) – Whether plaintiff's obligation to evict and demolish was a condition precedent for defendants to commence development works – Whether plaintiffs entitled to terminate JVA*

The first plaintiff was the widow of Law Mok Chin who passed away on 30 November 2010. The second and third plaintiffs were their sons. Law Mok Chin was previously the registered owner of a piece of land located in Johor ('the said land') who had, on 2 March 2006, executed a joint venture Agreement ('the JVA') with the defendant for the latter to develop the said land into a housing development project. Following Law Mok Chin's ('the deceased') demise, the ownership of the said land was transferred to the plaintiffs. As heirs of the deceased, the plaintiffs were bound by the terms of the JVA. The principal contention of the plaintiffs in their claim was that the defendant had breached cl. 7 of the JVA for having failed to complete the construction and development of the houses as set out in the JVA within five years from the date of the approvals from Pejabat Tanah dan Galian Johor ('PTGJ') in 2009. Thus, this failure entitled the plaintiffs to terminate the agreement under cl. 13(b) of the JVA. The defendant on the other hand, argued that despite having secured the requisite approvals, they were prevented from commencing construction of the project because the plaintiffs had, in breach of cl. 5(e) of the JVA failed to evict the squatters and demolish their factory buildings on the said land. As such, the defendant counterclaimed. The issues for determination were (i) whether having regard to the JVA, it was the contractual obligation of the plaintiffs to evict all squatters from the said land and demolish all buildings thereon, and if so, (ii) whether the obligation was in the nature of a condition precedent or otherwise a promise, that the non-performance of which would disentitle the plaintiffs to assert a breach of contract on the part of the defendant in failing to commence construction work on the said land.

Held (dismissing plaintiff's claim; allowing defendant's counterclaim):

(1) The plaintiffs, as the present owners under the JVA had given a clear undertaking and warranty not only to evict all squatters on the said land but also to demolish all buildings and structures thereon. Clause 5(e) of the JVA was in plain and clear language, without ambiguity and must

A therefore mean what it clearly said. The claim by the plaintiffs that the squatters would leave the said land when the defendant sought to commence construction was unconvincing and disingenuous. Further, the plaintiffs had not instituted any proceedings to evict and demolish. The inevitable answer to the first query was therefore in the affirmative.
B (paras 20, 25 & 26)

(2) The JVA did not specifically identify cl. 5(e) of the JVA to be a condition precedent to cl. 7 of the JVA. However a contract must be construed as a whole. The clause may in law be a condition notwithstanding that it is referred to as a warranty in the contract.
C Given that vacant possession was commonly understood to be a pre-requisite to construction and land development activities, cl. 5(e) ought more rightfully to be deemed as a condition instead of a warranty. Therefore, the breach of cl. 5(e) of the JVA went to the root of the JVA. (paras 23, 26, 29 & 30)

D **(3)** The duty to evict the squatters and demolish the buildings in cl.5(e) in the JVA carried with it the implied term that the same be performed by the plaintiff prior to the commencement of works by the defendant. The tests of business efficacy and officious bystander readily applied in the instant case. As the plaintiffs have yet to perform its reciprocal promise
E in the form of its obligation under cl. 5(e) of the JVA, the plaintiffs could not claim repudiation of the JVA nor claim damages on account of the non-performance of cl. 7 of the JVA by the defendant. Also, the plaintiffs' reliance on cl. 13(b) of the JVA as a ground for the termination of the JVA and forfeiture of the deposit could not be
F sustained. Section 13(b) of the JVA had no application to the plaintiffs' action since the non-performance by the defendant in relation to the obligation to complete construction of the housing scheme within the time stipulated in the JVA could be said to be directly due to the fault of the plaintiffs. (paras 43 & 47)

G **Case(s) referred to:**

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Bahamas International Trust Co Ltd v. Threadgold [1974] 1 WLR 1514 ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ
H *287 CA* ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Code Focus Sdn Bhd v. Tan Chee Hoe & Sons Sdn Bhd [2013] 4 CLJ 1053 CA ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(dist)***

I *Hillas & Co Ltd v. Arcos Ltd [1932] All ER Rep 494* ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(dist)***

Invescor Sdn Bhd v. Sobena Maju Sdn Bhd [2007] 1 LNS 483 CA ***(refd)***
Juta Damai Sdn Bhd v. Permodalan Negeri Selangor Bhd [2014] 5 CLJ 318 CA ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897 PC ***(refd)***
Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***
MBF Holdings Bhd & Anor v. Deutsche Bank (Malaysia) Bhd & Anor [2013] 6 MLRA 114 ***(refd)***
Mustapha Mohamed Noh v. Osman Shahidan & Anor [1985] 1 LNS 69 HC ***(refd)***
NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***
Omar Mat Ziki v. Mokhtar Amin [1996] 4 MLRA 479 ***(refd)***
Reardon Smith Line Ltd v. Yngvar Hansen-Tangen [1976] 3 All ER 570 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Stavers v. Curling [1836] 3 Bing NC 355 ***(refd)***
Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
Timur Permai Holdings Sdn Bhd v. Soon Seng Plywood & Timber Sdn Bhd (No 2) [1998] 3 CLJ 408 HC ***(refd)***
Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 2 All ER 260 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(f), 52, 53, 54, 55
Rules of Court 2012, O. 89
Specific Relief Act 1950, s. 7(1), (2)

For the plaintiffs - Siti Maznah Mariam Mokhtar (Ungku Ahmad Hafis Ungku Fathil with her); M/s Chiong & Partners
For the defendant - Reginald Vallipuram (Rajeswary Girupai & Yasmin Mohamed with him); M/s Reginald Vallipuram & Co

Reported by Sandra Gabriel

JUDGMENT

Mohd Nazlan Ghazali JC:

Brief Introduction

[1] This suit essentially involves the plaintiffs' claim to terminate a joint venture agreement concerning the development of a housing project and the defendant's counterclaim for a specific performance of the said joint venture agreement.

[2] Trial of the suit took place on 20 and 21 May 2015. The plaintiffs called three witnesses and the defendant, two. The plaintiffs filed their written submission on 3 July 2015. I gave my decision and the reasons for the same in this judgment dated 27 July 2015 delivered to the parties on even date.

A **Key Background Facts**

[3] The first plaintiff is the widow of Law Mok Chin who passed away on 30 November 2010. The deceased was previously the registered owner of a piece of land held under PM 1362 Lot 16479 (formerly known was HS(M) 3669, MLO 2411) located at Mukim Sedenak, District of Kulai, State
B of Johor ("the said land"), and had on 2 March 2006 executed a joint venture agreement with the defendant for the latter to develop the said land into a housing development project in accordance with the terms as contained in the joint venture agreement ("the JVA"). The second and third plaintiffs are their sons. Under the JVA, the defendant was to deliver to Law Mok Chin 20%
C of the total units to be built in the development. Law Mok Chin had also granted a power of attorney in favour of the defendant for the latter to conduct and manage all the affairs of Law Mok Chin concerning the development of the said land. Following his demise, the ownership of the said land was transferred to the plaintiffs pursuant to an order from Pejabat
D Pusaka Kecil dated 14 June 2013. In accordance with cl. (a) of the JVA and this is not disputed, as heirs of the deceased, the plaintiffs are thus bound by the terms of the JVA.

Key Contention Of The Parties

E **[4]** The principal contention of the plaintiffs is that the defendant has breached cl. 7 of the JVA for having failed to complete the construction and development of the houses under the scheme as set out in the JVA within five years from the date of the approvals from Pejabat Tanah dan Galian Johor ("PTGJ") in 2009. This thus entitles the plaintiffs to terminate the same under cl. 13(b) of the JVA.

F **[5]** The defendant on the other hand argued that despite having secured the requisite approvals, they are however prevented from commencing construction of the project because the plaintiffs have, in breach of cl. 5(e) of the JVA failed to remove and evict the squatters and demolish their factory
G buildings and workshops on the said land.

The Key Issue For Determination

[6] In my assessment, most of the salient facts are not in dispute. What is in contention is principally centred on the interpretation of the relevant clauses of the JVA.

H **[7]** The key issue for my determination is whether having regard to the JVA, it is the contractual obligation of the plaintiffs to evict all squatters from the said land (and demolish all buildings thereon) and if so, whether the obligation is in the nature of a condition precedent or otherwise a promise,
I the non-performance of which would disentitle the plaintiffs to assert a breach of contract on the part of the defendant in failing to commence construction work on the said land.

The Law On Construction Of Contractual Terms

[8] Common law has established a number of important principles in the interpretation of contracts, one of which, especially relevant for present purposes is that the construction of contract is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[9] This has since been emphatically followed in Malaysian cases, such as in the Court of Appeal decision in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38.

[10] Therefore, as a case in point, what the witnesses testified to be their understanding as to from which date, the time frame for construction of the housing project ought to have started is of no consequence to the interpretation of the pertinent clauses in the JVA. This is notwithstanding the discrepancies between the evidence of the deceased's widow, Leong Ah Kew, the first plaintiff (SP1) on the one hand, and that of her son Lew Chee Siong, the third plaintiff (SP2) and the family friend, Saw Swee Imm (SP3) on the other hand, as well as the testimony on the matter being affected as being hearsay since it was based not insignificantly on what had been told to the witnesses (SP1 and SP2) by the deceased, and to SP3 (who came into the picture to assist the plaintiffs only after the death of Law Mok Chin) by SP1. In any event, both SP1 and SP2 claimed to be illiterate and SP3 admitted her unfamiliarity with interpretation of legal documents.

The Key Clauses Of The JVA

[11] The plaintiffs rely heavily on cl. 7 of the JVA which provides for the time period for completion of the development of the housing scheme. The said cl. 7 reads as follows:

> The Developer shall commence construction on the said Land within six (6) months from the date of the approval of the advertising permit by the relevant authorities and shall complete the development of the allotted units hereafter referred to in Clause 13 hereto within a period of five (5)

A years from the date of approval or rejection of partition of the said Land PROVIDED ALWAYS that if the construction or any works thereof shall be delayed or hindered by fire or act of god, strikes, lockout, civil commotion, acts of war or hostility (declared or undeclared), emergency and general chaos then in any such case there shall be added to the said period as the Developer and the Owner(s) may agree in this event the
B Owner(s) shall grant a further extension of six (6) months to the Developer.

[12] It is the plaintiffs' case that, in reference to the stipulation contained in cl. 7, the defendant has breached the same, in view of the following:

C (i) the defendant did not start construction within six months nor apply for the advertising permit in the first place;

(ii) the defendant has not even started construction notwithstanding that the requisite approvals for the conversion and sub-division of the said land had been obtained on 4 November 2008; and

D (iii) none of the exceptions that would justify an extension of six months had occurred.

[13] The plaintiffs thus contended that there was a clear violation of cl. 7 by the defendant, especially when considered in the context of cl. 18 of the
E JVA which emphasises that time shall be of the essence. As such, the plaintiffs argued that this would entitle the plaintiffs to treat the JVA as being terminated and be of no further legal effect.

[14] It is worthy of emphasis that the defendant did not deny that construction works have not started nor has the advertising permit been
F applied for. Neither the testimony of a director of the defendant, Lau Chong Yong (SD1) nor the submission of counsel for the defendant disputes this.

[15] Neither did the plaintiffs deny that the defendant had performed their promises as set out in the JVA other than those related to the commencement of the construction of the housing scheme. The defendant had obtained the
G approval for the conversion and sub-division of the said land. The letter dated 4 November 2008 from PTGJ approved the construction of two semi detached house (four units) and ten terrace houses on the said land (cls. 4 b.1.2 and 6). The defendant also secured approval of the building plans on 30 November 2010, earthworks plan on 30 November 2011 and landscape
H plan on 2 December 2010. The defendant had also paid the requisite premium fees for the conversion, procured the issuance of the 14 sub-divided titles, paid all quit rent and assessments charges, and signed an agreement with the State Government dated 18 December 2008 requiring the defendant to complete the infrastructure in accordance with the approved plans. The
I defendant also tendered documentary evidence of the expenditure incurred in securing the various approvals and other related work in connection with the JVA through its two witnesses, Ho See Keng, a professional land

surveyor (SD1) and Lau Chong Yong, a director of the defendant (SD2). These included fees paid to secure the various approvals from the authorities, professional fees paid to consultants, quit rent and assessments, as well as directors' allowance for the year of assessment 2006 to 2011 paid to Lau Chong Yong (SD2), the director of the defendant in charge of the tasks related to the JVA. The documentary evidence for such expenses, not disputed by the plaintiffs and accepted by the court, showed a total expenditure amount of RM246,343.45.

[16] It is however an admitted fact that the defendant has not started construction of the housing scheme. There are three different time periods relevant to the obligation of the defendant under the JVA that must be considered. First, cl. 4 (1) of the JVA states the requirement for the defendant to complete construction in accordance with the agreed building plans and in any event within five years. The building plans were approved on 30 November 2010. As such, the defendant is strictly still within time. Secondly, cl. 7, as mentioned above, stipulates the requirement for the defendant to so commence within six months from the date of the approval of the advertising permit. But the JVA is silent on when the advertising permit must be applied for in order to trigger the obligation to commence within the said six months. Therefore, even if the plaintiffs argue that the obligation to obtain the advertising permit includes the duty to apply properly to secure consent by following *Timur Permai Holdings Sdn Bhd v. Soon Seng Plywood & Timber Sdn Bhd (No 2)* [1998] 3 CLJ 408; [1997] 4 MLRH 447 ("*Timur Permai Holdings*") could be accepted, strictly no time frame is stated in the JVA in respect of which the defendant could be said to have been in breach. In any event, I accept the clarification by SD2 that advertising permit was not applied for since no construction could commence in any event.

[17] This leads us to the third time frame stipulated in the JVA. This is the crux of the defence of the defendant. This concerns cl. 7 referred to earlier which prescribes the completion of the housing scheme within a period of five years from approval of the partition of the said land. As mentioned earlier, it is not disputed that construction has not even commenced. During cross-examination, the director of the defendant, SD2 repeatedly said, in response to the question that the defendant had failed to commence construction, that the defendant "failed with reason". This was clarified by SD2 during re-examination to be referable to the problem concerning the illegal occupation by the two squatters on the said land, and this is contended to be the reason preventing construction.

[18] The defendant accordingly relies on cl. 5(e) of the JVA which provides the following:

A 5. The Owner(s) hereby warrants and undertakes:

...

(e) to evict all squatters, tenants, and occupiers on the said Land (if any) and demolish all buildings structures and erections thereon (if any) ...

B

The Analysis Of The Facts & Application Of The Law

[19] In my evaluation there are three questions that must be addressed in relation to cl. 5(e) of the JVA in order to be able to fully determine the principal issue to be resolved in this case. The three are as follows:

C First query:

(i) are the plaintiffs responsible to evict and demolish?

Second query:

D (ii) if the answer to question (i) above is in the affirmative, have the plaintiffs performed their promise to do so?

Third query:

(iii) what is the legal effect of the answer to query (ii) on the promise of the defendant to complete the housing scheme under cl. 7?

E

I shall now deal with the first query.

The First Question – Are The Plaintiffs Responsible To Evict And Demolish?

F **[20]** Are the plaintiffs responsible to evict the squatters and demolish the building structures? I find no basis to construe cl. 5(e) other than how it is plainly drafted. The plaintiffs, as the present owners under the JVA have given the clear undertaking and warranty not only to evict all squatters on the said land but also to demolish all buildings and structures thereon. I hold that the clause is in plain and clear language, without ambiguity and must G therefore mean what it clearly said. In the often quoted House of Lords decision in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, it was established that if the express terms are perfectly clear and free from ambiguity there is no choice to be made between different possible meanings and the clear terms must be applied even H if the court thinks some other terms would have been more suitable. As for cl. 5(e) of the JVA, I do not find that there are other different possible meanings or that some other terms would have been more suitable. For the same reasons, the testimony of Leong Ah Kew, the spouse of the late Law Mok Chin (SP1) during cross-examination who stated that the plaintiffs' I responsibility was only to ask the squatters to leave and that demolition of

their building structures was not the plaintiffs' responsibility is wholly untenable. The law will also not allow a party to a contract to renege on his promise or attempt to re-write the same. The inevitable answer to the first query is therefore in the affirmative.

The Second Question: Have The Plaintiffs Fulfilled The Promise To Evict And Demolish?

[21] Next, the second query. Since the first query is answered in the affirmative, have the plaintiffs performed their contractual promise to evict and demolish? It is not disputed that there are two squatters on the said land. One is an entity known as AH B Welding & Painting which carries on welding work at a workshop situated on the said land. The other is known as Nice Industries Sdn Bhd which operates a factory on the said land. The plaintiffs contended they have discharged their responsibility under the JVA after having taken the following courses of action:

(i) the deceased had earlier lodged a police report;

(ii) the plaintiffs had lodged a complaint to Pentadbir Tanah & Daerah Kulaijaya; and

(iii) the plaintiffs had also lodged a complaint to Majlis Perbandaran Kulai ("MPK"), in consequence of which MPK sent notices of demolition (pursuant to the Street, Drainage and Building Act 1974) to the two squatters.

[22] The plaintiffs further claimed to have had several meetings with the squatters and the defendant, in respect of which it was alleged that the squatters agreed to vacate the said land if and when construction by the defendant was to start. The plaintiffs additionally claimed that their lawyers, Messrs JP Thye & Co had also issued a number of notices of demand to the squatters. The plaintiffs therefore take the position that they had taken all reasonable steps to discharge their responsibility under cl. 5(e) of the JVA. The plaintiffs relied on the case of *Timur Permai Holdings* where the court held that the yardstick as to whether the defendant had taken all reasonable steps to obtain the relevant consent is based on an objective test in that what would a reasonable person have done in the circumstances.

[23] In *Timur Permai Holdings* the court held that the crucial words "The vendor shall ... obtain the consent" contained in the sale and purchase agreement connotes the imperative and pre-emptory intention of the parties and the compulsory duty imposed on the vendor who was obliged to obtain the consent within the stipulated time period of 18 months. In that case, the defendant could avoid being in breach by exercising his right to seek an extension of time for a further period of 18 months, which, under the agreement, the plaintiff could not refuse to grant. Yet, the defendant sought

to terminate the agreement when the application for consent was pending approval of the relevant authorities subject to correction of the errors and omissions (which were in fact caused by the defendant themselves) and refused to exercise the right to seek an extension of time. It is against this background and context that the court in *Timur Permai Holdings* emphasised the principle that the law would give business efficacy and validity to agreements, which are always entered into by the contracting parties for a specific purpose; a contract does not exist in a vacuum (see *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 3 All ER 570). More importantly, the court held that the defendant must take reasonable steps to fulfill the implied duties of making a proper and complete application for sub-division, making the application promptly and following up on the application. Thus, applying the yardstick of whether the defendant had taken all reasonable steps to obtain the relevant consent based on what a reasonable person would have done in the circumstances, given the evidence in that case (where the defendant had submitted an application which was defective in three material particulars, and had yet to rectify the same; did not make the submission promptly; and did little or nothing as far as follow-up action was concerned), the court adjudged that the defendant was clearly in breach of its implied duty in relation to the application for sub-division.

[24] In the instant case, cl. 5(e) is clear and far from ambiguous. Nor is it necessary for additional terms be implied into the same. In this sense it is therefore not necessary to embark upon the analysis of "reasonable steps" adopted in *Timur Permai Holdings*. The plaintiffs must evict and demolish. This they have not done, notwithstanding efforts taken thus far, which are at best only preliminary and precursory but in no uncertain terms still an unfulfilled contractual promise. Even if the objective test adopted in *Timur Permai Holdings* were to be applied, and the question what would a reasonable person seeking to discharge his contractual duty under cl. 5(e) have done in the circumstances, it is in my view without doubt and inescapable that the answer cannot be other than the reasonable person securing a court order for the eviction and demolition, especially considering the fact that the efforts thus far taken by the plaintiffs had not been successful. I am therefore not persuaded that *Timur Permai Holdings* is of assistance to the plaintiffs.

[25] Further, I consider the claim by the plaintiffs that the squatters would leave the said land when the defendant seeks to commence construction to be unconvincing and somewhat disingenuous. If the notices from MPK had seen little impact on the squatters, in open defiance of a lawful directive from a local authority, it seems highly unlikely to expect them to vacate the said land simply upon a request by either the plaintiffs or the defendant on the basis of the defendant being ready to commence construction work.

[26] The law stipulates the manner to recover possession of the said land by resorting to s. 7(1) of the Specific Relief Act 1950 which provides for the recovery to be in accordance with the law relating to civil procedure. This is contained in the procedures on summary proceedings for possession of land under O. 89 of the Rules of Court 2012. I should also emphasise that the common law remedy of self-help where the owner of the land was entitled to go into his land at any time to remove the occupier without the aid of the court is now no longer available by virtue of the amended s. 7(2) of the Specific Relief Act 1950. This provision states that a person entitled to possession shall not enforce his rights against an occupier who remains in occupation of the property despite the cessation of a tenancy otherwise than by proceedings in the court. I see no compelling reason why the self-help remedy should still be available for non-tenancy cases such as involving squatters *simpliciter*. After all, resort to O. 89 is practical and sensible because the rationale, as submitted by the defendant, is to avoid damage to property and injury to person and generally to avoid disturbance and any breach of peace. Accordingly, as the plaintiffs have not instituted any proceedings to evict and demolish, the answer to the second query whether the plaintiffs have fulfilled their obligation under cl. 5(e) is therefore unmistakably in the negative.

Third Question – Effect Of Failure To Perform By Plaintiffs Vis-à-vis Non-performance By Defendant

[27] The third question is whether the failure by the plaintiffs to evict the squatters and demolish their building structures under cl. 5(e) of the JVA prevents the plaintiffs from asserting a breach of contract by the defendant on account of the latter's non-completion of the housing development project under cl. 7. The plaintiffs firstly referred to the cases which established the importance of time in commercial contracts and how developers are bound by the relevant contracts to complete projects on time. However, in all these cases, namely *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2012] 1 MLRA 322, *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201; [2003] 1 MLRA 261 and *Omar Mat Ziki v. Mokhtar Bin Amin* [1996] 4 MLRA 479, the issue encountered in the instant case, namely the contention that the owners had in the first place allegedly breached their obligation that prevented the developer from commencing construction work did not arise at all.

[28] The plaintiffs further submitted that cl. 5(e) is not a condition precedent to the performance of the defendant's obligation under cl. 7 to commence construction. In particular cl. 4(b.2) stipulates that upon approval for partition being obtained, the owner undertakes to comply with the requirements specified therein, none of which relates to the duty of the plaintiffs to evict the squatters before the commencement of construction work by the defendant. The plaintiffs referred to the case of *Invescor Sdn Bhd*

v. Sobena Maju Sdn Bhd [2007] 1 LNS 483; [2007] 3 MLRA 356 where the Court of Appeal held, amongst others in connection with the failure of the developer to obtain a loan to pay the balance of security deposit to the owner, that there was nothing in the relevant agreement to suggest that the creation of a charge (to enable the developer raise the security deposit) was a condition precedent for the payment of the security deposit since these are separate and independent obligations. It was also held that since time for payment of deposit is fixed but no time was specified for the creation of the charge, any suggestion of the latter being a condition precedent to the former would thus be negated.

[29] I agree that the JVA, as drafted does not specifically identify cl. 5(e) to be a condition precedent to cl. 7. Nor does cl. 5(e) contain a time frame for performance. However, as a starting point, it is a well-established principle that a contract must always be construed as a whole (see *Mustapha Mohamed Noh v. Osman Shahidan & Anor* [1985] 1 LNS 69; [1986] 1 MLJ 182). Further, even though cl. 5(e) is drafted as a warranty and undertaking it does not necessarily follow that it is in a nature of a warranty instead of a condition, thus be considered less important, in which case the breach of which would only give rise to an action in damages and does not excuse the innocent party from further performance of the contract. (see *Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394; [1983] 1 MLJ 220). The clause may in law be a condition notwithstanding that it is referred to as a warranty in the contract. In the case of *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675 the Court of Appeal held that the provision in relation to the payment of the purchase price by one party was a fundamental term and that the obligation to deliver up the executed memorandum of transfer by another party was merely a subsidiary term. In my view however given that vacant possession is commonly understood to be a prerequisite to construction and land development activities, cl. 5(e) ought more rightfully to be deemed as a condition instead of a warranty.

[30] An alternative classification which focuses on the consequences of the breach of the terms has also been applied by the courts. In *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231; [1999] 2 MLJ 510, Gopal Sri Ram JCA (as he then was) explained as follows:

> An alternative method of classification of the terms of a contract is according to, not their relative importance, but the consequences of their breach. This approach is especially useful in cases of synallagmatic contracts. Under the alternative method, if the breach of a particular term goes to the root of the contract so as to affect its very substratum, then the remedy of the innocent party lies in repudiation and damages. However, if its breach produces lesser consequences, the remedy of the innocent party lies in damages only. See *Bowes v. Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha* [1962] 2 QB 26.

In the instant case, I do not consider a breach of cl. 5(e) to be anything other than going to the root of the JVA, especially given the JVA being synallagmatic in nature, or stated in a different fashion, containing reciprocal promises.

[31] The counsel for the plaintiffs however do not fully analyse the relationship and implications of cl. 5(e) and cl. 7 of the JVA in the context of the performance of reciprocal promises which in my view is directly applicable to the instant case. In their reply to the defendant's submission, the plaintiffs took the stance that the issue of reciprocal promises is not applicable. I shall deal with the arguments of the plaintiffs after briefly setting out the concept of reciprocal promises and the case law on the subject.

[32] In the case of *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897, the Privy Council stated that the following common law principle (as per Tindal CJ in *Stavers v. Curling* [1836] 3 Bing NC 355) has since been imported in the Laws of Malaysia by s. 55 of the Contracts Act 1950:

> ... the question whether covenants are to be held dependent or independent appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give away.

[33] Section 55 of the Contracts Act 1950, inclusive of the Illustrations, reads as follows:

> 55. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.
>
> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.
>
> ILLUSTRATIONS
>
> (a) A hires B's ship to take in and convey, from Kelang to Singapore, a cargo to be provided by A, B receiving certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.
>
> (b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

A

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

B

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[34] In the case of *Juta Damai Sdn Bhd v. Permodalan Negeri Selangor Bhd* [2014] 5 CLJ 318 ("*Juta Damai*"), the Court of Appeal applied s. 55 of the Contracts Act 1950, finding that the respondent breached its reciprocal promise to give vacant possession to enable surveyors to conduct survey of the land and permit the appellant to proceed with site preparations before construction could begin. In particular the court considered illustration (b) to be of relevance to the facts of the case.

C

D

[35] In another Court of Appeal decision in *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746 ("Cipta Cermat") it was held that only the registered proprietor had the legal right to take the necessary action to evict the squatters on the land. The court also applied s. 55 of the Contracts Act. The following passages from the judgment of Gopal Sri Ram JCA on the application of s. 55 are most instructive:

E

> ... Apply that here. It is quite plain that the plaintiff could not, taking into account the surrounding circumstances, have paid the balance of the purchase price until the defendant had helped 'in solving the squatter problem' by getting them off the lands. Unlike *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, this is not a case where the payment of the balance of the purchase price was the only fundamental term of the contract. Having regard to the surrounding circumstances, the eviction of the squatters was an equally fundamental term. It is plain that the plaintiff contracted to buy the lands for the specific purpose of developing them. It made this clear in its letters of 12 September 1990 and 8 December 1990 written to the defendant. In fact it was a condition of the contract that the development on the lands must commence within a year from the date of the signing of the formal agreement (see para 1(f) of the letter of 1 July 1991). In order for the development to take place, the lands must be cleared of squatters. And, it is the defendant who was in the best position to do that (see *Royal Bristol Permanent Building Society v. Bomash*). Hence, the plaintiff was, in my judgment, clearly entitled to withhold the payment of the balance of the purchase price until the squatters had been cleared from the lands.

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[36] In yet another Court of Appeal's decision of *Code Focus Sdn Bhd v. Tan Chee Hoe & Sons Sdn Bhd* [2013] 4 CLJ 1053; [2013] 4 MLJ 59 ("*Code Focus*") which applied s. 55 of the Contracts Act 1950, a number of points worthy of emphasis are in my view as follows:

(i) the agreement for sale and purchase of the land contained conditions precedent, both concerning approvals;

(ii) the term on the delivery of vacant possession by the defendant is not specified as a condition precedent but together with the obligation on the part of the plaintiff to pay balance purchase price, the contractual obligations of parties were ruled as reciprocal, attracting the provisions of ss. 52, 53 and 55 of the Contracts Act 1950; and

(iii) upon applying illustration (a) to s. 53 of the Act and the fact that the real nature of the transaction concerned a sale and purchase of the land, the court held that the obligation to deliver vacant possession had to be performed before the obligation to pay the balance of the purchase price. Further, by virtue of illustration (a) to s. 52 of the Act, the plaintiff would not be required to pay the balance of the purchase price on the completion date because on that date, the defendant was unable to deliver vacant possession of the land. By virtue of s. 55 of the Act the plaintiff was also entitled to withhold payment of the balance of the purchase price until the encroachments had been cleared from the land.

[37] The plaintiffs in the instant case submitted that the issue of reciprocal promises is not relevant. The plaintiffs argued that *Juta Damai* does not support the defendant's case since firstly cl. 5(e) does not state the obligation to deliver "vacant possession" before the defendant can commence construction, and secondly, cl. 5(e) does not stipulate any time period.

[38] On the first point, I do not agree that the concept of reciprocal promises is not relevant to the present action. Section 2(f) of the Contracts Act 1950 defines "reciprocal promises" quite simply as promises which form the consideration or part of the consideration for each other. Clearly, cl. 5(e) and cl. 7 of the JVA could be construed as promises which form part of the consideration for the parties under the JVA. Further, it is of little significance that cl. 5(e) does not include the words "vacant possession" since the eviction of squatters and demolition of their factory and building structures would effectively and for practical purposes mean the same thing as vacant possession, considering the context. *Cipta Cermat* for example, does not involve a clause on vacant possession either, but instead, similar to the instant case, refers to the term that all costs for removing the squatters ought to be borne by the plaintiff.

[39] As for the second point, the absence of the time period to perform cl. 5(e) is immaterial considering the nature of the obligation embodied in the said clause. It is true that the obligation to deliver vacant possession in *Juta Damai* and *Code Focus* could be said to be referable to a certain time

A period. In the case of *Juta Damai* it was six months from the signing of the agreement and in *Code Focus* it was upon the completion date. I do not find it imperative that a certain time period must be established before an obligation can qualify as a promise which performance is dependent on the principle of reciprocity. Section 55 as set out above does not stipulate the
B need for a time period. Indeed, the relevant clause on removal of squatters in *Cipta Cermat* also does not contain any specification as to the time for compliance. Of greater relevance for this purpose is s. 53 of the Contracts Act 1950 which reads as follows:

> 53. Order of performance of reciprocal promises.
>
> C Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, **where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires**. (emphasis added)
>
> D ILLUSTRATIONS
>
> (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
>
> E (b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

[40] Accordingly, if the order of performance is not expressly specified,
F like in the instant case, the sequence is to be determined by the nature of the transaction. It is my view that when considering the question which of the two - whether removal of squatters, and demolition of building structures from the said land or commencement of the development project on the same land must happen first, it is trite, basic and commonsensical that the answer
G must surely be the former must precede the latter. The same position was taken in *Juta Damai*, *Code Focus* and *Cipta Cermat*. In the latter two cases, the Court of Appeal expressly made reference to s. 53 of the Contracts Act 1950 in finding that the contractual performances in the form of the removal of squatters and delivery of vacant possession must happen first.

H **[41]** In the Court of Appeal decision in *Mars Equity Sdn Bhd v. Tis 'Ata' Ashar Sdn Bhd* [2005] 1 CLJ 513 ("*Mars Equity*") the sole issue was the order in which the promises of the respective parties were to be performed. The parties entered into two agreements in respect of a plot of land. One was for the transfer of the land from the defendant to the plaintiff whilst the other
I contemplated an application by the plaintiff for a license to fell and extract timber in connection with the land. As it transpired, neither did the defendant transfer the land to the plaintiff nor did the plaintiff apply for a

timber license. The plaintiff then brought an action for specific performance, contending that the two agreements should be construed together. Conversely, the defendant argued that the agreements, when read separately as they should be, envisaged an application by the plaintiff for a timber license first; and because the plaintiff did not so apply, the defendant had no corresponding obligation to affect a transfer of the land to the plaintiff. The learned judge found for the defendant and the plaintiff appealed.

[42] In delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA held the following:

> In the present instance, the two agreements when read together do not expressly fix the order of performance of the parties' respective obligations. Accordingly, the nature of the transaction must be looked at to determine this. Taking the two agreements together and reading them as a whole and in the context of what Lord Wilberforce in his speech in *Prenn v. Simmonds* [1971] 3 All ER 237 described as "the objective aim of the transaction", it is clear that the appellant cannot possibly apply to the appropriate authority for the licence until it becomes the registered proprietor of the land in question. For, it is common sense that a non-registered proprietor has no standing to apply for the kind of licence contemplated by the timber agreement. In my judgment, in a purely commercial transaction such as the one we have here, the correct approach is to interpret the agreements in a way that is consonant with business commonsense. As Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at p 201:
>
> > While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.
>
> Unfortunately, the High Court did not take this approach. It treated the two agreements as separate contracts and dealt only with the appellant's obligations under the timber agreement without having any regard to the sale of land agreement. Consequently it failed to have any sufficient regard to the order in which the parties were to perform their respective obligations. In my judgment there is therefore merit in the complaints directed at the High Court's judgment by learned counsel for the appellant.
>
> It follows that the respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. The present case, in my judgment, falls plumb within s. 55 of the Contracts Act 1950.

[43] Having regard to the same business common sense principle as applied in *Mars Equity*, there is simply too tenuous a contention that the sequence of performance in the instant case is the reverse where the defendant must commence construction work on the said land first before the issue of the squatters and their building structures be dealt with. Even if ss. 53 and 55 of the Contracts Act 1950 were not relevant (which is of course not the case), I hold that the duty to evict the squatters and demolish the buildings in cl. 5(e) in the JVA carries with it the implied term that the same be performed by the plaintiff prior to the commencement of works by the defendant. In my view, the tests of business efficacy and officious bystander applied by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151 are easily satisfied in the instant case. The expressions and answers of "oh, of course" for the officious bystander test and "it goes without saying" for the business efficacy test, would readily apply to the issue whether cl. 5(e) must precede cl. 7 of the JVA.

[44] The business common sense approach applied in *Mars Equity* and implication of terms to give business efficacy to the JVA are both consistent with the principle that the law leans in favour of upholding bargains and not in striking them down willy-nilly. After all, parties take the trouble and make the effort to negotiate and enter into a contract to achieve a specific objective. In *MBF Holdings Bhd & Anor v. Deutsche Bank (Malaysia) Bhd & Anor* [2013] 6 MLRA 114, the Court of Appeal referred to the judgment of Gopal Sri Ram JCA for the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 which in turn quoted with approval the following passage of Lord Wright in *Hillas & Co Ltd v. Arcos Ltd* [1932] All ER Rep 494:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

[45] Therefore, in my judgment, in the instant case, since the plaintiffs failed to perform their promise in cl. 5(e), which should have happened first before the defendant could commence construction as per cl. 7 (either due to the application of s. 53 of the Contracts Act 1950 or the court implying a term into cl. 5(e) to give business efficacy to the contract), the plaintiffs

clearly cannot claim against the non-performance of the reciprocal promise by the defendant in the said cl. 7. Since the plaintiffs are not entitled to make a claim against the defendants, their action in this case must therefore fail.

[46] In view of the foregoing, the answer to the third query, which is also the key issue for determination in the instant case is that as the plaintiffs have yet to perform its reciprocal promise in the form of its obligation under cl. 5(e), the plaintiffs cannot claim repudiation of the JVA nor claim damages on account of the non-performance of cl. 7 by the defendant.

[47] For substantially the same reason, the plaintiffs' reliance on cl. 13(b) of the JVA as a ground for the termination of the JVA and forfeiture of the deposit cannot be sustained. Clause 13(b) reads as follows:

> (a) In the event that the Developer fails to obtain the approval for conversion and sub-division of the said Land from the relevant authorities and to complete the construction of all the allotted units referred to in clause 12(a) above on the said Land within the time specified in this agreement and such failure is not directly due to the fault of the Owner(s) or breach by the Owner(s) of his obligations herein, then (i) the deposit sum of RM20,000.00 only shall be forfeited to the Owner(s) absolutely upon the expiry of the five (5) years period free from interest and thereafter this agreement shall become null and void and neither party shall have any claim against the other and the Developer will return the original issue document of title known as HS (M) 3669, MLO 2411, Mukim Sedenak to the Owner(s).

In particular, in my assessment, cl. 13(b) has no application to the plaintiffs' action since the non-performance by the defendant in relation to the obligation to complete construction of the housing scheme within the time stipulated in the JVA can, on the grounds discussed above pertaining to the performance of reciprocal promises, be said to be directly due to the fault of the plaintiffs or the breach of the obligation of the plaintiffs in cl. 5(e) of the JVA.

[48] Under s. 55 of the Contracts Act 1950, the plaintiffs must make compensation to the defendant for any loss which the latter may sustain by the non-performance of cl. 5(e). In addition, s. 54 may also be relevant. It reads as follows:

> 54. Liability of party preventing event on which contract is to take effect.
>
> When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the party for any loss which he may sustain in consequence of the non-performance of the contract.

[49] Thus, to the extent that the plaintiffs could be deemed to have prevented the performance by the defendant by the plaintiffs' non-performance, the JVA is voidable at the option of the defendant who is entitled to repudiate the same, in addition to be entitled to compensation from the plaintiffs.

[50] The counsel for the defendant have however made it clear in their submission that the defendant does not seek to claim damages under s. 54 (and I presume s. 55 as well) so as not to burden the plaintiffs' financially, insisting that the defendant continued to be able and willing to complete construction of the housing development scheme. The defendant submitted that delivery of the built up houses meant for the plaintiffs in accordance with the JVA could be fulfilled within two years from the date of vacant possession of the said land is given to the defendant.

Counterclaim By Defendant

[51] In view of the evaluation as outlined above which concluded that the action by the plaintiffs against the defendant cannot be sustained, I considered that on balance of probabilities the defendant has on the other hand proven its case as pleaded in the counterclaim and is therefore entitled to prayer 39(a), (b), (c), (d) and (e) of the counterclaim. In summary the prayers are as follows:

(a) Specific performance of the JVA;

(b) Declaration that the plaintiffs are liable to deliver vacant possession of the said land to the defendant;

(c) Order that plaintiffs commence legal proceedings within one month for the eviction of squatters and demolition of building structures;

(d) Order that the 14 title deeds remain in custody of Messrs JP Thai & Co as stakeholder as per cl. 5(b) of the JVA; and

(e) Order that the plaintiffs execute a power of attorney in favour of the defendant in terms identical to the power of attorney dated 17 March 2006 save that the lands comprised in the 14 sub-divided titles be substituted for the said land in the first recital.

[52] I accept that prayer (e) would be necessary for the parties to proceed with the full implementation of the JVA. This is given the fact that as the ownership of the sub-divided 14 titles are now registered in the name of the plaintiffs, the earlier power of attorney granted by the late Law Mok Chin has lapsed, necessitating a fresh power of attorney, this time to be given by the plaintiffs as the present owners of the said land, in order to enable the defendant to execute the terms of the JVA towards its full implementation. I am further of the view that as for prayer (c), the time for the commencement of the proceedings to evict and demolish should be made within three months instead of one month from the date of this judgment.

Conclusion

[53] In summary, as the plaintiffs have yet to perform their reciprocal promise of evicting the squatters and demolishing the building structures on the said land, their claim for the termination of the JVA and forfeiture of deposit for non-commencement of construction works by the defendant cannot succeed and is therefore dismissed with costs. The defendant's counterclaim is accordingly allowed, subject only to the time period stated in the prayer for the plaintiffs to institute court proceedings for the eviction of the squatters and the demolition of their building structures within one month of this judgment, be extended to three months.